IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 810, Misc.

THE CARTER OIL COMPANY, A CORPORATION,
Petitioner,

vs.

HARLAN B. RAMSEY AND RUBY RAMSEY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

STATEMENT OF THE MATTER INVOLVED.

This case involves the sole issue, as to whether the lessee in an oil and gas lease has the right to select the plan and method of the operation of the lease, provided he act as a prudent, competent and experienced operator having in mind the interest of both lessor and lessee.

The plaintiffs, as lessors, filed a suit in equity against

the petitioner, as lessee in an oil and gas lease, to restrain the defendant from converting one of four oil wells on a forty acre tract into a "gas in-put" or "repressure" well. The District Court granted the injunction, which was affirmed in the Court of Appeals for the Seventh Circuit.

The controlling facts are not in dispute.

Plaintiffs are the owners of the surface of forty acres of land and of the undivided three-fourths mineral rights underlying the same, and executed an oil and gas lease, that was duly assigned to the petitioner, giving it the right of mining and operating for oil and gas for a period of ten years, and as long thereafter as oil or gas, or either of them, was produced from said land by the lessee. The owner of the remaining mineral interest also executed a lease to petitioner.

Early in 1939 the petitioner drilled the property and brought into successful production four wells, one being placed in the center of each ten acres of the tract in accordance with the customary spacing in that immediate field. Well Number One was in the northwest ten acre tract and is the well that petitioner sought to convert into an in-put well.

The initial production of each well was approximately 360 barrels per day. At the time of the trial the total daily production of all four wells had declined to 25 barrels per day, and Well Number One was producing only one-sixth of the total, or 4¼ barrels per day.

All oil wells have a natural tendency to decline during their productive life from the initial production to entire depletion. The primary cause is the dissipation of the reservoir energy which is originally present in the form of gas. In the continual pumping of the oil, this gas energy that causes the oil to flow to the well is exhausted until the well ultimately ceases production.

The evidence shows that by the so-called natural method of production by pumping that only about twenty-five or thirty per cent of the oil originally in place is recovered.

To extract additional oil that cannot be recovered by the natural pumping methods, the oil industry has perfected a technique known as the secondary recovery of oil by a gas repressuring system. Gas is a natural and effective agent in the production of oil and repressuring therewith is accomplished by gathering the gas produced in an oil field and piping it into a central pressuring plant, from whence it is forced under pressure through pipelines into various wells at strategic locations in the oil field. These wells are known as in-put wells and they are selected with a view to exerting uniform pressure on producing wells whose production has already diminished for want of gas pressure to a few barrels of oil. The wells selected for the purpose are converted into gas in-put wells and the gas is forced into them so that its pressure may be exerted against the sandstone formation or structure containing the oil and from which the remaining wells are producing. Thus, the production of oil from all of the lands involved is materially enhanced. The expense of securing the gas, of gathering lines, pressure plant, field lines to the wells, and all of the instrumentalities and all expense incurred in the operation thereof is borne solely by the operator. This expense is large and is always entirely free to the lessor or mineral owner.

The successful planning of such a gas repressuring system cannot be carried on in a small tract but requires the participation of all operators in the area being repressured so that the plan can be worked out which will provide for uniform repressuring in the area on an equitable basis for all the operators and royalty interests involved. This requires the proper spacing of the gas in-put wells so as to

accomplish the efficiency in the secondary recovery of oil that is desired.

The great bulk of the oil recovered by this method from this forty acres is actually dead oil, which, except for this proposed repressuring program, would be irretrievably lost and forever left in the ground, and the lessee would be deprived of its interest to the extent of seven-eighths thereof, and also the respondents, as lessors, would fail to get the one-eighth royalty that is provided for in the lease.

The evidence shows, without contradiction, that the installation of the gas repressure system that was enjoined in this case is an approved and sucessful method that has been generally in practice for many years, and that the plan and method that was enjoined in this case is one that would have been adopted by a prudent, competent and experienced operator under the same circumstances and conditions, and having in mind the best interests of both lessor and lessee, and that the conversion of Well Number One and the continued operation of the remaining three wells would produce a minimum additional production of 34,000 barrels, and a probable maximum production of 110,000 barrels from this lease, and to the benefit of both the plaintiff and the defendant. (Finding of Fact Ten, Tr. 204.)

The three wells under the proposed operation will produce from 34,000 to 110,000 more barrels of oil than all four wells will produce if left to operate under the present operation.

The evidence further showed that gas injected into the converted well has a natural tendency to go in all directions and that it will cause oil in comparatively negligible quantities to migrate across the lease lines and that there is no way to prevent it. This natural tendency will cause some oil to migrate from the northwest five acres of the

tract to the north and the west. The part that went to the west would go onto an eighty acre tract of which the petitioners owned nine-twentieths. (Tr. 52.) The evidence also showed that there would be a compensation for that loss of oil by substantially the same amount of oil coming onto the plaintiffs' lease from a similar well converted into a gas in-put well on the south (Tr. 75, 117), and it was stipulated by the petitioner that the well adjoining the lessor's premises on the south would be converted into a gas in-put well. (Tr. 186.)

There was no evidence that any prudent operator would have conducted the proposed operation differently. All experts agreed that it would be possible to drill a new gas in-put well in the northwest corner of the leasehold and prevent the oil from the northwest five acres migrating to the north and west, but they also all agreed that there is always the danger of channeling, and because of this danger the experts testified that to make a new in-put well at the northwest corner of the leasehold, while it would prevent the migration of the oil, it would not be efficient and produce the additional recovery of oil that was contemplated by the repressuring system.

By "channeling" is meant that if gas is forced into an in-put well closer to a producing oil well than the other producing wells to be served such gas will make a tunnel or conduit to the closest well so that its efficiency with respect to the other wells is lessened and eventually the closest well will be transformed primarily into a gas well producing the gas intended to serve all of the wells. Thus, not only is the purpose of the repressuring defeated, but the oil production from the closest well is lost. The initial effect of the proper operation of a repressuring system is to cause a slight movement of oil at the locality of the in-put well, but as the pressure builds up in the structure more oil is recovered than can be recovered by natural

methods and practically all of this additional oil comes from under lessor's land.

The District Court held:

(1) That the lessee under an oil lease had the right to adopt the method and manner of operation, provided he acted as a prudent, competent and experienced operator would act under the same conditions, bearing in mind the interest of the lessor and lessee. (Tr. 198 and 207, Par. 11.)

(2) That the gas repressuring system for the secondary recovery of the oil was not an experiment but was an approved practice, and under the lease in question the lessee had the right to inject gas as a part of a repressuring system for the purpose of recovering oil that could not be recovered by the natural method of recovery, and it was probably its implied duty to do so. (Tr. 199, 204, Par. 9.)

(3) Upon its completion of the repressuring program the gas forced into the converted well and into the producing formations under pressure will cause the production in the three remaining wells to be enhanced and the ultimate production therefrom greatly increased, to the benefit of both the plaintiffs and the defendant. (Tr. 204, Par. 10.)

But the District Court concluded that because the oil that migrated from the leasehold was the plaintiffs' oil, that the plaintiffs had the right to have the oil left in place until and unless repressuring can be done by a plan which will preserve to them all their oil as well as increase the production from the remaining land, and that defendant could not operate as proposed even though to do so may result in monetary benefit to the plaintiffs or in a speedier or more efficient production of oil from a part of plaintiffs' premises. (Tr. 206, Par. 7.)

The Court of Appeals affirmed the judgment of the District Court.

JURISDICTIONAL STATEMENT.

The judgment appealed from was entered on February 9, 1949; petition for appeal was filed and petition for rehearing was denied by the Circuit Court of Appeals on March 7, 1949.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under present Title 28, Section 1254 (1), of the U. S. Code.

QUESTIONS PRESENTED.

The questions presented clearly appear from the opinion of the Court of Appeals (Tr. 238) where it states the contention of the defendant as follows, to-wit:

> "Defendant contends the general rule is that as it has the responsibility of operating the lease it has the authority to direct the method of operation which is qualified only in that it must act as a prudent operator and for the benefit of both the lessor and the lessee. It argues that the proposed plan of repressuring is not only a feasible program but that it, as the court found, is in common usage among oil operators, and that the experts called by both sides were not in disagreement as to its propriety. It concedes that replacing a productive and offset well with a gas input well will cause migration of oil from the plaintiffs' land, but it argues that by plaintiffs' admission under the repressuring program the oil production will be increased a minimum of 34,000 additional barrels and a maximum of 110,000 additional barrels. To this it points as proof of its proposed prudent operation and the absence of damage to plaintiffs."

The opinion then states the view of the Court of Appeals as follows, to-wit:

> "While the foregoing general statement is sound and the argument is persuasive, it is not determinative of this case.
>
> "The deciding factor of this appeal, and the issue on which the parties are in disagreement, is whether plaintiffs are the owners of the underground oil on their premises. The District Court held that it belongs to plaintiffs and that a method which forces the oil to migrate to another's land is an invasion of specific property rights."

The opinion then states that the plaintiffs are the owners of the oil and, if not enjoined, the defendant will interfere with plaintiffs' property rights.

Therefore, the questions presented on the record are solely questions of law, to-wit:

1. Is the technical title of the plaintiffs the deciding factor, or in any way relevant, in the interpretation of the lease in determining the rights thereby granted to the defendant?

2. If the plaintiffs granted the right to the defendant to operate the leaseholds as a prudent, competent and experienced operator would operate it, bearing in mind the interest of the lessor and the lessee, can the plaintiffs complain of a proposed prudent operation that is beneficial to the plaintiffs?

3. If the action of the defendant was within its legal right as a prudent operator, and for the benefit of both the lessor and the lessee, can the plaintiffs itnerfere with that right which was granted to the defendant by the lease because there is a loss of some oil in the operation, but which loss is merely an incident to a prudent operation, and does not amount to legal waste?

4. Is it not paradoxical to hold that the lessee has the right, and probably the implied duty, to recover the oil under this lease by adoption of an approved secondary system of recovering oil, and then enjoin the operation unless it is done in a way that is impossible?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. The decision of said Circuit Court of Appeals in affirming the injunction of the District Court is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit, on the same matter, in the case of *Utilities Production Corporation* v. *Carter Oil Company*, 72 F. (2d) 655.

2. The decision of the Circuit Court of Appeals is palpably erroneous on its face, and has the effect of preventing the secondary recovery of oil by an approved method and involves a question of great public importance in the conservation of natural resources and for the public safety in case of war.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 9587, Harlan B. Ramsey and Ruby Ramsey, Plaintiffs-Appellees, *versus* The Carter Oil Company, Defendant-Appellant, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this 3rd day of May, A. D. 1949.

THE CARTER OIL COMPANY,
Petitioner,

By WILLIAM M. ACTON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The opinion in the District Court is found on page 198 of the Record and a copy is attached as Appendix A, and the opinion of the Court of Appeals is found on page 237 of the Record and is reported in 172 F. (2d) 622, and a copy is attached as Appendix B.

ARGUMENT.

I.

The Court of Appeals Did Not Decide the Case on Any Issue, Either Factual or Legal, That Was Relevant to the Controversy, and Palpable Error Appears on the Face of the Opinion.

The dispute in this case is not factual, but is solely a question of the legal right of a lessee under an oil and gas lease, under the uncontradicted facts appearing in the evidence.

Throughout the trial, and on appeal, the defendant has contended:

1. That it, as lessee, had the responsibility of operating the lease and also the authority to direct the method of operation, which was qualified only in that it must act as a prudent operator and for the benefit of both the lessor and the lessee.

2. That under the common usage of the oil industry it had the right to replace a productive and offset well with a gas in-put well for the purpose of enhancing the production of the leasehold, where the wells were rapidly declining in production.

3. That the experts called by both sides were in agreement that the proposed operation was a prudent one which should be installed for the interest of both lessor and lessee.

4. As an incident to such operation, there is an unavoidable migration of oil from plaintiffs' land, but the over-all production will be increased a minimum of 34,000 additional barrels and a maximum of 110,000 additional

barrels, to the benefit of the plaintiffs. Since the migration of oil occurs without any negligence or inefficiency in the prudent operation, that there is no legal damage to the plaintiffs.

The Court of Appeals said (Tr. 238):

> "While the foregoing general statement is sound and the argument is persuasive, it is not determinative of this case.
>
> "*The deciding factor* of this appeal, and the issue on which the parties are in disagreement, is whether plaintiffs are *the owners* of the underground oil on their premises."

The proper operation for the production of oil is not a matter on which there is general information but depends upon the knowledge of those with experience in the industry. Both sides recognized this fact and the plaintiffs called one expert and the defendant called five experienced petroleum engineers and geologists. Fortunately these experts all agreed in their conclusions. Where the evidence consists solely of the testimony of experts, the Court is bound by their testimony. (*Peabody Coal Co.* v. *Ind. Com.*, 289 Ill. 449, 124 N. E. 566.)

Neither the District Court nor the Court of Appeals in this case made any inference from the evidence that the migration of oil could be prevented by a prudent operation in a secondary recovery system of production and, under the law, in the face of positive and uncontradicted testimony of unimpeached witnesses, neither court would have the right to make any inference that the loss of oil by migration could or should have been avoided by a prudent operation. (*Penn. R. R. Co.* v. *Chamberlain*, 288 U. S., 333, 77 L. Ed. 819.)

It is submitted that the Court of Appeals in its decision decided the case upon a matter that was entirely irrelevant and not material or controlling.

The only proper issue that could be raised in this case would be by a contention that the propositions of law above stated are incorrect or to challenge the facts. The Court of Appeals did neither in its decision and decided the case on the palpably erroneous assumption that the deciding factor is whether plaintiffs are the owners of the underground oil on their premises.

If, as we contend, the question of ownership of the oil in place is not a deciding factor as to the right granted to the lessee under the lease, then this judgment necessarily must be reversed, since a decision upon an irrelevant issue would not be a decision of the case at all.

II.

The Technical Title of the Plaintiffs to the Oil in Place Is Not the Deciding Factor and Neither Is It Relevant or Material.

The Court of Appeals was in error in stating:

> "The deciding factor of this appeal, and the issue on which the parties are in disagreement, is whether plaintiffs are the owners of the underground oil on their premises."

The petitioner has never considered that the quality of plaintiffs' title had anything whatever to do with the interpretation of the lease as to the rights of the parties. It is well established in Illinois that a lessee cannot question the title of its lessor. (*Koelmel* v. *Kaelin,* 374 Ill. 204, 29 N. E. (2d) 106.)

It is also the rule in Illinois that when a grantor makes a conveyance of a mineral interest he conveys all the title he has, whether he owns the full title or only a part, and if the conveyance purports to convey more than he actually owns it does have the legal effect of conveying the entire interest

that belongs to him. (*Triger* v. *Carter Oil Co.*, 372 Ill. 182, 23 N. E. (2d) 55.)

There is no question in Illinois that the owner of land does have sufficient title to oil and gas in place that he can prevent any other person without authority from exploring for and producing oil and gas from the owner's land, and also that he can grant such right to a third person, and when such right is conveyed, then the lessee has the right to explore for, produce and remove oil and gas from the land, and that the right possessed by the lessee is an interest in the land itself and is a freehold. (*Transcontinental Oil Co.* v. *Emmerson*, 298 Ill. 394, 131 N. E. 645.)

The only question is as to the nature, extent and quality of the title of the owner of the land before the oil is actually reduced to possession because of its fugacious character. The reason that arises for this question is, that these substances are fugitive, and the water, oil or gas which is under land today may be elsewhere tomorrow, and the landowner is only entitled to hold as his own the water, oil or gas which he finds under his land and reduces to possession, but the right to explore for these substances and reduce them to possession, if found, is a valuable part of his property and is an interest in the land springing out of his ownership of everything above and below the surface. But since it is conceded that the landowner has this proprietory interest, by whatever name it may be called, the exact nature and extent of the title or ownership is immaterial in determining the rights granted by an oil and gas lease. (*Jilek* v. *C. W. & F. Coal Co.*, 382 Ill. 241, 249, 47 N. E. (2d) 96.)

It is obvious that since a lessee has only such title as is granted by the lessor he is not in a position to question the title of the lessor but is relying upon it, and it is immaterial by what name the title of the lessor is designated, that is, a fee simple title absolute and unqualified or merely "a quali-

fied title not complete until the oil is reduced to possession."

It must be noticed that the learned Judge who wrote the decision of the Court of Appeals in the instant case also wrote the opinion of that court in a former case reported in *Chicago, Wilmington & Franklin Coal Co.* v. *Minier*, 127 F. (2d) 1006, wherein the court at page 1010 expressly held that the quality of the title of the lessor was not material in interpreting the rights granted by an oil and gas lease, and that the lease fixed what one individual may do and what another one may not do, and that it was for the incident of operation that the parties bargained and not for *"titular absolute ownership"* of the oil and gas in place.

We submit that it is obvious that the title of the plaintiffs cannot be the deciding factor of this appeal.

Suppose A makes a contract with B, which provides that B shall process lumber of A into furniture. Litigation ensues in a suit by A against B wherein it is sought to enjoin B from further operation under the contract on the ground that he is wasting the lumber in the manufacturing process. Isn't it obvious that the title of A is assumed and that the only question would be whether B was proceeding in an approved, prudent manner in using the lumber in the manufacturing process?

Can any reason be given as to why the kind of title of the lessor is relevant in deciding the right granted to the lessee? In Illinois the lessee necessarily admits the title of lessor by the mere acceptance of the lease.

III.

The Decision Is in Conflict With the Decision of the Court of Appeals for the Tenth Circuit.

If the quality of the plaintiffs' title to the oil in place is not relevant in the interpretation of the rights of the lessee, then it certainly follows that in this case no question exists as to the right of the defendant to select the method of operating the lease and the trial court so held (Tr. 207, Par. 9), and the Court of Appeals approved petitioner's contention on that point (Tr. 239). Then the only remaining question is the factual one, as to whether the proposed method is an approved one, that would have been selected by a prudent, competent and experienced operator under the same conditions, bearing in mind the interest of both lessor and lessee.

As above pointed out, no question is raised in the opinion of the Court of Appeals regarding the facts. The opinion assumes the facts are as we contend, and the Court expressly says that our contention is both sound and persuasive, and then makes the erroneous conclusion that the title of the plaintiffs is relevant and controlling and, because plaintiffs have the title, says that defendant cannot operate in a prudent and approved way where there is a loss of oil, notwithstanding the loss is an unavoidable incident to a prudent and efficient operation.

Such conclusion is, in effect, in direct conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit, in *Utilities Production Corp.* v. *Carter Oil Co.*, 72 F. (2d) 655, which holds that the secondary recovery of oil by a gas repressuring system is an approved and recognized system and one that the lessee has the right to install and maintain, and in that case the court said (659):

> "In fact, the lessor would doubtless have just cause to complain if an inefficient operation of the leases re-

> sulted from the failure of the lessee to use improved methods which came in common use during the terms of the leases."

The decision of the Court of Appeals in this case by the Seventh Circuit does not give effect to the substance of the above decision of the Court of Appeals for the Tenth Circuit, but at most would only be giving "lip service" thereto.

It is true that in the Utilities Production Corporation case there was no contention made of a loss of oil by migration.

Such difference in fact does not justify a disregard of the decision in that case as to the legal right of the lessee to select the method of operation.

Such difference as to the factual situation justifies only the inquiry as to whether the loss of oil by migration was the fault of the defendant and should have been prevented by proper diligence in the operation, or in other words, "legal waste".

No other inquiry is permissible and we will now point out that there is not a scintilla of evidence to show "legal waste".

In fact the decision of neither the trial court nor the Court of Appeals is based on such inquiry, but is bottomed on the erroneous theory of the relevancy of title to the oil that is lost.

IV.

The Loss of Oil Complained of in This Case Is Not a Legal Waste.

We would readily concede that if there was evidence in this case that there was a loss of oil to the plaintiffs by reason of a negligent or imprudent operation by the lessee, that then the plaintiffs would have a right to complain. That is the only place where the title of the plaintiffs would

be material. To complain of waste the plaintiffs should necessarily have sufficient title to sue for damages caused by waste. Such quality of title is conceded in the plaintiffs in this case.

But will anyone claim that where (as in this case) the right is given to the lessee to select the method of operation as a prudent operator; a prudent method of operation has been selected that would have been selected by any competent operator, bearing in mind the interest of lessor and lessee; the method selected is for the benefit of the lessor, and by virtue of the method of operation there is unavoidably a small loss of oil in the procuring of a larger additional recovery, that such loss is a legal waste, notwithstanding there was no negligence, inefficiency or lack of care in the operation?

Such loss of oil might be within the popular meaning of the word "waste", but "waste" under the law is a species of tort which is defined as an unlawful act or omission of duty on the part of the tenant which results in a permanent injury to the inheritance. To be a legal waste there must be a violation of an obligation on the part of the tenant by which an injury or damage occurs to the landlord by a negligent act. (56 Am. Jur., Sec. 2, page 450; 67 C. J., Sec. 1, page 610.) No case can be found to support the theory that the loss of oil in this case is "legal waste".

It is therefore obvious that since the plaintiffs gave the right to the defendant to operate in a prudent manner, that the plaintiffs cannot complain so long as the defendant is operating as a prudent operator. The small loss of oil is incident to the prudent, approved operation. It is common knowledge that in any oil field there is often a gas product that frequently is a complete loss, where not in sufficient quantities to produce and save it by the erection of a processing plant. No one would say that in such instance the rights of the plaintiffs were being violated because there

was a necessary and unavoidable loss of gas in the operation of the oil well, notwithstanding that the gas that was lost belonged to the plaintiffs.

V.

The Decision Is Palpably Erroneous on Its Face and Is of Great Public Importance in the Conservation of a Natural Resource.

The effect of this decision creates a paradox. Analyzed, it holds:

(a) The right in the lessee to select an approved prudent method of operation, and that lessee probably has the implied duty to install the gas repressure system,

(b) That the lessee has selected such an approved method,

(c) That the operation of the three wells under the proposed gas repressure system will produce more oil than the operation of all four wells under the natural pumping system, viz., at least a minimum of 34,000 additional barrels, and probably an additional 110,000 barrels of oil,

(d) That the proposed method is for the benefit of the lessors, as well as lessee,

(e) That any prudent, competent and experienced operator, bearing in mind the interest of both lessors and lessee, would have adopted the proposed method,

(f) That migration of some oil across lease lines is incident to the proposed system and cannot be avoided and at the same time achieve an efficient secondary recovery system, and yet the lessee is enjoined from the proposed operation unless it prevents the migration of oil. That is something that can't be done, and also a thing that no prudent operator would even try to do, bearing in mind the interest of both lessor and lessee.

The decision is not only palpably erroneous and contrary

to the decision of the Circuit Court of Appeals for the Tenth Circuit, but it is also a decision of the greatest public importance in its effect on the public welfare of the United States. The depletion of this particular forty acre lease and the necessity of applying the secondary recovery of oil method to enhance its production is not an isolated situation. If so, it would have no general or public importance. But the same situation applies to many hundreds and perhaps thousands of leases in the different oil fields of the United States where depletion in production naturally takes place upon the exhaustion of the original gas energy. In all these instances the major portion of the oil in the reservoir underground remains as dead oil and useless to the industry of the nation unless secondary recovery is accomplished.

In many leases undivided interests in the minerals are assigned to and purchased by various persons, and, sometimes, there may be a hundred or more such owners of a single lease. If this approved method of secondary recovery of oil cannot be initiated without the consent of all the owners, notwithstanding that the proposed method is of benefit to them, then the hands of the operator are tied and it is impossible to conserve this vast resource of oil that lays dead in the hidden caverns of the oil pools.

We submit that this Court has the right to and should take judicial notice of the importance of the decision appealed from. Recent utterances of the Secretary of the Interior have emphasized the rapid depletion of our oil reserves and has suggested the possibility of a more costly production of oil by extraction of the same through the processing of shale in Colorado and other states, and the same suggestion is contained in a recent report of the Federal Bureau of Mines. With the unrest in the world and the possibility of a major conflict, where oil will be an indispensable asset, it is difficult to conceive of a decision

that is more far-reaching in public interest and the conservation of a natural resource than the judgment appealed from.

Formerly, the chief instrumentality employed in tilling land was a pointed stick. Now, tractors are in general use. The pointed-stick method undoubtedly avoided considerable erosion by wind and other elements, yet today no landlord could enjoin his tenant from employing a tractor, particularly if the tenant bore the entire expense. The effect of the lower courts' decisions is to compel us to use the equivalent of the pointed stick in operating for oil or gas, or in the alternative to pay tribute to our landlord for the privilege of employing what every prudent operator would employ, having in mind not only his own interests but those of his landlord as well.

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing said decision because the decision is (1) in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit, and (2) is palpably erroneous on the face of the opinion and concerns a matter of the greatest public importance justifying certiorari under many previous decisions of this Court set forth in Section 304 of Jurisdiction of the Supreme Court of the United States by Robertson & Kirkham.

Respectfully submitted,

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APPENDIX A.

MEMORANDUM OF DISTRICT COURT FILED DECEMBER 6, 1947.

Implicit in this oil lease is an obligation on the part of the lessee to use reasonable diligence to develop the demised premises so long as the enterprise can be carried on at reasonable profit. *Daughetee* v. *Ohio Oil Company,* 263 Ill. 518. Implied also is a covenant that the lessee will by appropriate measures protect the leasehold against drainage by offset wells. Summers, Oil & Gas, Perm. Ed. Sec. 399, Vol. 2, p. 338, *et seq.* *Powers* v. *Bridgeport Oil Company,* 238 Ill. 397; *Geary* v. *Adams Oil & Gas Co.,* 31 F. Supp. 830. It is clear, therefore, that defendant owes plaintiffs the duty to develop the oil content of the land and to produce therefrom as a reasonably prudent operator as long as oil can be profitably produced and the duty to protect plaintiffs from drainage by drilling offset wells. All this it has apparently done. The well now proposed to be made a gas repressuring well is one of the offset wells drilled by defendant so as to prevent drainage in accord with defendant's duty to plaintiffs. It would seem obvious that to abandon this well, to close it down or to reconvert it into a repressuring well, will remove from production a well drilled for and furnishing offset protection against drainage so long as oil is produced from this and offset territory. Defendant must prevent drainage and the moment it changes an offset well into a nonproducing well it violates that duty.

Defendant is obliged to develop the property and produce oil in the manner and to the extent that a reasonably

prudent operator would operate, having due regard for the interest not only of himself but also that of the lessor. Oil repressure methods, looking to additional secondary recoveries of oil, are of comparatively recent origin; they are not ancient in practice. Consequently slight judicial comment concerning them is to be found. They include repressure by water, compressed air, gas or other fluids. They lead to an additional recovery, in case of gas, of 5% of the oil in place. Reasoning from analogy, it would seem that a reasonably prudent operator bound to produce oil by approved methods has the right implied in an oil lease to adopt proper gas repressuring systems for secondary recovery of oil. Indeed, it would seem that he is under the same duty to do so as he is to drill offset wells. In other words, defendant, as a prudent operator, has a right to adopt any approved method of repressure for secondary recovery and the use of gas is one of the approved methods. But the question presented is not whether gas repressuring is proper practice but whether the proposed method and plan of defendant can be said to be that of a reasonably prudent operator, having in mind the rights of plaintiffs. It is undisputed that if this well is converted into a gas repressure well all the oil under five acres of ground will be forced to migrate from the plaintiffs' land onto another's land and will be wholly lost to plaintiffs. In Illinois that oil belongs to plaintiffs. A grant of oil and gas is "a grant not of oil that is in the ground, but to such part thereof, as the grantee may find. * * * The right to go upon the land and occupy it for the purpose of prospecting and removing oil, if of unlimited duration, is a freehold interest." Title to oil and gas as such vests in the grantee only when he takes it from the land. *Watford Oil and Gas Company* v. *Shipman*, 233 Ill. 9; *Gillespie* v. *Fulton Oil & Gas Co.*, 239 Ill. 326; *Conover* v. *Parker*, 305 Ill. 292; *Chicago, Wilmington & Franklin Coal Co.* v. *Minier*, 127 F. 2d. 1006; *Chicago,*

Wilmington and Franklin Coal Co. v. *Herr,* 40 F. Supp. 311.

The defendant has only one right under its lease and that is to remove the oil according to approved methods for the benefit of itself and its lessor. It has no right to drive it from plaintiffs' land by any method. To do so is clearly a trespass upon and a violation of plaintiffs' right and title to the oil in place. *People* v. *Bell,* 237 Ill. 332; *Bruner* v. *Hicks,* 230 Ill. 536; *Big Six Development Co.* v. *Mitchell,* 138 F. 279. To permit defendant to direct developments in the manner adapted only to the promotion of his gain and effectually to the impoverishment of the lessor's estate in oil and gas cannot in reason be deemed as even remotely contemplated by either party at the inception of the lease. *Jennings* v. *Southern Carbon Co.,* 73 W. Va. 215, 80 S. E. 368, 19 A. L. R. 438; *Daughetee* v. *Ohio Oil Co., supra.* It is not a question of whether that oil can otherwise be taken from the soil. Plaintiffs own the oil and they have a right to have it left in place and to be removed only by methods which will not deprive them of it. Any conversion of the oil by the lessee by driving it away or otherwise is a clear invasion of plaintiffs' rights.

But, says defendant, plaintiffs will receive more oil from the remaining portion of their land. That may be well and true, but the oil that will migrate is their oil and the mere fact that they have other oil in other parts of their lands which will be increasingly produced, does not alter the status of plaintiffs' property rights. What plaintiffs are objecting to, is repressuring under a plan which deprives them of a part of their oil; and to this they have a right to object. They have a right to have the oil left in place until and unless repressuring can be done by a plan which will preserve to them all their oil as well as increase the production from the remaining land.

But, defendant says, plaintiffs will be reimbursed by migration of oil to their land from the Durbin land to the east and south, perhaps 1/4 to 1/2 mile away, because, asserts defendant, it intends to convert wells on those lands to repressuring wells. Of course, obviously, whether that will be done is all in the future; whether and when it will be done, where the wells will be and what the result will be, is entirely conjectural; and whether oil will be taken from Durbin's land and given to plaintiffs is wholly problematical. But if all that were to happen, Durbin would have the same right to object as plaintiffs have now and the wrong to Durbin can not right the wrong to plaintiffs.

This problem is simple. Plaintiffs are entitled to have their offset wells preserved. The proposed conversion violates the obligation of defendant to maintain such offset wells. Such is a wrongful act by defendant. But more than that, by its conversion of the offset well to a repressure well, it will drive from plaintiffs to the west, north and east, and perhaps to the south, a substantial portion of the oil which is plaintiffs' which defendant has the right only to produce for plaintiffs' benefit and its own. This is not only a breach of the obligation of defendant to prevent drainage through offset well but it is, in addition, a taking of plaintiffs' property. Such a case, it seems to me, is particularly appropriate for equitable action. *Daughetee* v. *Ohio Oil Co., supra; Brewster* v. *Lanyon Zinc Co.*, 140 F. 801.

Proper judgment for injunction as prayed may be presented.

The findings and conclusions herein contained are made a part of my more formal findings of fact and conclusions of law of even date herewith.

Entered this 6th day of December, A. D. 1947.

(Signed) WALTER C. LINDLEY,
Judge.

APPENDIX B.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED FEBRUARY 9, 1949.

Before KERNER, *J.*, and BRIGGLE and DUFFY, *District Judges.*

KERNER, *J.* Defendant by this appeal seeks to reverse a judgment enjoining and restraining it from converting a specific oil well located on plaintiffs' property into a repressure well as long as the well is producing oil in paying quantities and as long as it is reasonably required for the protection of plaintiffs' property against offset drainage by producing wells located upon adjacent premises.

From the pertinent facts it appears that with the exception of one-half of the coal and mineral rights underlying the east twenty acres which were owned by one Leavy, plaintiffs owned in fee simple a tract of forty acres of land in Fayette County, Illinois. Plaintiffs and Leavy executed separate oil and gas leases on their respective interests with the defendant, and subsequently, in 1939, plaintiffs and Leavy executed an agreement with the defendant which provided that the tract be commutized and operated as one unit; and that the parties share in the royalties from the proceeds of the sale of the oil in the proportion of the land owned by them. Defendant drilled four wells on the commutized tract and placed one well approximately in the center of each quarter of the tract. The evidence showed that at the time of the trial, while each of the wells was producing oil in commercial quantities, these quantities were decreasing. The court found as a fact that the continued operation of each of the wells

was essential to the proper production of oil from plaintiffs' premises, and that defendant owned and operated leases covering lands adjacent to plaintiffs' on the east, the south, and the west, in such a manner as caused oil to drain from plaintiffs' premises except as the oil was prevented by the operation of all the producing wells as offsets on plaintiffs' premises. The court also found that one of the reasons for the decline of oil production was the exhaustion of gas in the reservoir energy; that the defendant in an effort to increase oil production became a party to a repressuring program which covered approximately one thousand acres of land and which included plaintiffs' land; that this repressuring program was customarily used by operators in their efforts to increase the recovery of oil; that in regard to plaintiffs' land, under the repressuring program defendant proposed to convert the oil producing well in the northwest quarter into a gas input well which would cause production in the three remaining wells ultimately to be greatly increased to the benefit of the parties herein.

This is a suit in equity in which Leavy did not join plaintiffs, and the problem is one of resolving two apparent and opposing theories of the rights of the parties under their lease. In his memorandum opinion, 74 F. Supp. 481, the District Judge recognized it when he stated at the outset:

> "Implicit in this oil lease is an obligation on the part of the lessee to use reasonable diligence to develop the demised premises so long as the enterprise can be carried on at reasonable profit * * * Implied also is a covenant that the lessee will by appropriate measures protect the leasehold against drainage by offset wells."

Under the defendant's program, a producing well which offsets and prevents drainage of oil from the plaintiffs' land is to be replaced by a gas repressuring well.

Defendant contends the general rule is that as it has the responsibility of operating the lease it has the authority to direct the method of operation which is qualified only in that it must act as a prudent operator and for the benefit of both the lessor and the lessee. It argues that the proposed plan of repressuring is not only a feasible program but that it, as the court found, is in common usage among oil operators, and that the experts called by both sides were not in disagreement as to its propriety. It concedes that replacing a productive and offset well with a gas input well will cause migration of oil from the plaintiffs' land, but it argues that by plaintiffs' admission under the repressuring program the oil production will be increased a minimum of 34,000 additional barrels and a maximum of 110,000 additional barrels. To this it points as proof of its proposed prudent operation and the absence of damage to plaintiffs. While the foregoing general statement is sound and the argument it persuasive, it is not determinative of this case.

The deciding factor of this appeal, and the issue on which the parties are in disagreement, is whether plaintiffs are the owners of the underground oil on their premises. The District Court held that it belongs to plaintiffs and that a method which forces the oil to migrate to another's land is an invasion of specific property rights. Defendant argues that this holding is in direct conflict with *Jilek* v. *C. W. & F. Coal Co.*, 382 Ill. 241.

In that case the question before the court was whether an owner of land in fee simple could convey to another the right to take or own the oil in the ground by a mineral deed without executing a conveyance at the same time of the surface estate. From the facts it appeared that the original grantor had conveyed all of the coal, oil, gas and other minerals to one grantee, and subsequently had con-

veyed the land by the same description to another with the exception of the minerals. The contention was made by a remote grantee to the surface estate that while solid minerals are conveyed with the underlying minerals estate, nonsolid minerals such as oil and gas, because of their wandering character, are rights which remain affixed to the surface estate. The court held that oil and gas are minerals, and consequently that they belong to the mineral estate and are not part of the surface estate. In discussing the relationship of oil in the earth with the owner of the estate it quoted with approval from *Gray-Mellon Oil Co.* v. *Fairchild,* 292 S. W. 743, 745, a statement that because oil is of a fugitive character, the owner in fee "does not own a specific cubic foot of * * * oil * * * under the earth until he reduces it to possession." We interpret this to mean that the owner of the land has title to the oil in the ground, but because of the character of oil he does not own ten, twenty or one thousand barrels or any specific amount of the underground oil until he drills for it and actually reduces to his possession a certain specific quantity of oil.

Ownership of specific quantities of the underground oil is not the problem in this case. Moreover, both of the cases noted above unequivocally stand for the legal proposition that oil is a mineral and part of the underground land. Examination of further applicable Illinois cases do not as defendant states in its brief "merely hold that * * * plaintiffs have the right to control the search for the oil and gas," but confirm the foregoing rule. *Updike* v. *Smith,* 378 Ill. 600, 604; *Watford Oil and Gas Co.* v. *Shipman,* 233 Ill. 9; *Poe* v. *Ulrey,* 233 Ill. 56; and *Triger* v. *Carter Oil Co.,* 372 Ill. 182. It is clear that if not enjoined the defendant will interfere with plaintiffs' property rights. Accordingly, the judgment of the District Court must be affirmed. It is so ordered.